No. 2013-1644 and
No. 2013-1766
(Consolidated)

# In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. C 120822

PATRICIA HULSMEYER,

*Appellee/Cross-Appellant,*

v.

HOSPICE OF SOUTHWEST OHIO, INC., et al.,

*Appellants/Cross-Appellees.*



## JOINT COMBINED THIRD BRIEF OF APPELLANTS/CROSS-APPELLEES BROOKDALE SENIOR LIVING, INC., HOSPICE OF SOUTHWEST OHIO, INC., AND JOSEPH KILLIAN

Robert A. Klingler
Brian J. Butler
ROBERT A. KLINGLER Co., L.P.A.
525 Vine Street, Suite 2320
Cincinnati, OH 45202-3133
Tel: (513) 665-9500
Fax: (513) 621-3240
rak@klinglerlaw.com
bjb@klinglerlaw.com

*Attorney for Appellee/Cross-Appellant*
*Patricia Hulsmeyer*

Susan M. Audey (0062818)
(Counsel of Record)
Victoria L. Vance (0013105)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Tel: (216) 592-5000
Fax: (216) 592-5009
susan.audey@tuckerellis.com
victoria.vance@tuckerellis.com

*Attorneys for Appellant/Cross-Appellee*
*Brookdale Senior Living, Inc.*

Michael W. Hawkins (0012707)
(Counsel of Record)
Faith C. Whittaker (0082486)
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202
Tel: (513) 977-8200
Fax: (513) 977-8141
michael.hawkins@dinsmore.com
faith.whittaker@dinsmore.com

*Attorneys for Appellants/Cross-Appellees Hospice of Southwest Ohio, Inc., and Joseph Killian*

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## I. Introduction

Appellee/Cross-Appellant Patricia Hulsmeyer readily admits, as she must, that R.C. 3721.24 is silent as to whom a report of suspected resident abuse or neglect must be made. She remains steadfast in her argument, however, that there is no ambiguity. Violating a fundamental rule of statutory construction, she then *adds* words to the statute and claims that the report can be made to any of the following:

- a resident's sponsor;
- a superior in management;
- law enforcement;
- any appropriate entity (Second Br. at 10, 12, 15, 16); or
- someone in the vicinity of the resident (*id.* at 17).

None of these persons or entities are named in R.C. 3721.24. The very fact that they are not underscores the statute's ambiguity and requires this Court to look further than the plain words of the statute to determine the General Assembly's intent. As argued in the Joint First Brief of Appellants/Cross-Appellees Hospice of Southwest Ohio, Joseph Killian (collectively "Hospice") and Brookdale Senior Living, that intent can only be found by reading R.C. 3721.24 along with related statutes, R.C. 3721.22, 3721.23, 3721.25, and 3721.26, which were all enacted together in Am.Sub.H.B. No. 822 in 1990 as part of a comprehensive statutory framework for reporting and investigating suspected resident abuse and neglect. And when construed together, the "makes a report" language of R.C. 3721.24 requires the employee to make a report to the Director of Health. Only that construction gives effect to the General Assembly's intent to provide a comprehensive framework that independently protects the resident's rights by empowering the Director of

Health to receive reports, investigate those reports, issue subpoenas for the production of documents or the attendance of witnesses at a hearing as to any reports, and, if substantiated, notify the attorney general, county prosecutor, or other appropriate law enforcement official of the results of the investigation. And, if not substantiated, only the Director of Health has the power to expunge all records related to the report and its investigation. None of the parties Hulsmeyer *adds* to the "makes a report" language of R.C. 3721.24 have any of the powers the General Assembly has seen fit to vest with the Director of Health. Nor are any of the Hulsmeyer-added persons or entities referenced anywhere in in R.C. 3721.22 through 3721.26 as appropriate persons to receive any report.

Hulsmeyer's remaining arguments do not change this result, nor does this result compel reversal of the First District's disposition of her wrongful-discharge claim. Hulsmeyer cannot recover in a wrongful-discharge tort when the public policy is based on reporting abuse because R.C. 3721.24 provides an adequate remedy and the public policy is not jeopardized in the absence of a separate common law claim. Further, even if Hulsmeyer does not have a retaliation claim under R.C. 3721.24, Hulsmeyer's wrongful-discharge claim still fails because there cannot be a separate public policy claim as society's interests are adequately protected under R.C. 3721.24.

## II. Argument in reply to appeal

### A. Hulsmeyer's arguments that R.C. 3721.24 is not ambiguous only underscore the statute's ambiguity.

Hulsmeyer concedes that R.C. 3721.24 is silent as to whom a report of suspected resident abuse or neglect must be made. Second Br. at 8, 17. This concession alone makes the statute ambiguous and subject to further interpretation. For sure, the "makes a report"

language presupposes that the report has to be made *to* someone.[1] But Hulsmeyer's efforts to "fill in the blanks" do not comport with fundamental rules of statutory construction.

### 1. Hulsmeyer's construction of the "makes a report" language of R.C. 3721.24 can only be reached by *adding* words that are not there—or anywhere in R.C. 3721.22 to 3721.26.

Hulsmeyer repeatedly argues that the protection against retaliation extends to persons and entities she herself names—a resident's sponsor, a superior in management, law enforcement, a facility's director of nursing, any other appropriate entity, or someone in the vicinity of the resident. Second Br. at 10, 12, 15, 16, 17. But the General Assembly did not include any of these persons or entities when it enacted this statute in 1990, nor has the statute ever been amended to include them since that time. In fact, since the Eighth District Court of Appeals decision in *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist. No. 74835, 2000 WL 968790 (July 13, 2000), in 2000, the General Assembly has not saw fit to amend the statute to accommodate Hulsmeyer's interpretation. And nowhere in the statutory framework codified at R.C. 3721.22 to 3721.26 is there any reference to making a report of suspected abuse or neglect to any of these Hulsmeyer-added persons or entities. This Court cannot add words to R.C. 3721.24 that are not there—or anywhere in R.C. 3721.24 to 3721.26. *See State ex rel. Carna v. Teays Valley Loc. Sch. Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 24; *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 49; *Wachendorf v. Shaver*, 149 Ohio St. 231, 237-38 (1948).

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[1] Amicus curiae Ohio Employment Lawyers Association (OELA) argues in support of Hulsmeyer that the "intention to make a report" language supports a broad, unlimited interpretation because an employee could intend to make a report that goes nowhere and still be protected. Not so. The General Assembly saw fit to protect those in the reporting process, including those who only *intended* to make that report to the Director of Health.

At bottom, the silence of R.C. 3721.24 as to whom a report of suspected abuse or neglect is to be made brings this case squarely within the analysis and reasoning of *Sheet Metal Workers' Internatl. Assn. Loc. Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747. Hulsmeyer's conclusory attempt to distinguish this case falls flat. There is no difference between the silence of R.C. 4115.05 and the silence of R.C. 3721.24. And that silence compels a reading of R.C. 3721.24 with the related statutes enacted along with it to reach a conclusion that the report must be made to the Director of Health to fall within the protection against retaliation.

Amicus curiae Ohio Employment Lawyers Association (OELA)'s reliance on *State ex. rel. Carna v. Teays Valley Loc. Sch. Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, does not change this result. The time restriction the school board urged in construing the request-for-meeting provision of R.C. 3319.02(D)(4) is not analogous to a statute that protects against retaliation someone who "makes a report" but is thereafter silent as to whom the report must be made. Unlike R.C. 3319.02(D)(4), which plainly says that the meeting should be held upon the employee's request (*see id.* at ¶ 23), a report of suspected abuse or neglect under R.C. 3721.24(A) requires a report to be made *to* someone. There is nothing silent about R.C. 3319.02(D)(4) as there is in R.C. 3721.24(A) that would make an in pari materia reading with related statutes appropriate.

Moreover, OELA's argument cuts both ways. Hulsmeyer "adds" several categories of persons and entities that she claims "fill the gap" of R.C. 3721.24(A)'s silence. Nowhere in that statute does it list any of the categories Hulsmeyer claims are appropriate recipients of a report of suspected abuse or neglect. OELA's "means-what-it-says" argument falls flat with a silent statute.

So too does its argument that the "intention to make a report" language supports a broad, unlimited interpretation because an employee could intend to make a report that goes nowhere and still be protected. Not so. There is no reason to conclude that this language, too, like the "makes a report" language, should be treated any differently. The General Assembly saw fit to protect those in the reporting process, including those who only *intended* to make that report to the Director of Health. There is nothing absurd about this construction. But when the report is plainly made to someone other than the Director of Health, or the employee intends to make a report to someone other than the Director of Health, R.C. 3721.24(A) is not in play. OELA's unsupported statement about what "likely" occurred between the parties is not legal argument and is nothing more than speculation.

### 2. The statute's "makes a report" language is not "general" language that makes this language unambiguous.

Hulsmeyer relies on *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, in an attempt to support her argument that the "makes a report" language in R.C. 3721.24 was the General Assembly's intentional use of broad language. Use of broad language, she argues, does not make the statute ambiguous. Second Br. at 8-9.

Hulsmeyer's reliance on *Robinson* for this argument is misplaced. *Robinson* has nothing to do with the General Assembly's use of broad language. On the contrary, at issue in that case was whether the damaging of a single private telephone or cellular phone was "property" sufficient to constitute a violation of disrupting public services under R.C. 2909.04(A)(3). In finding that a single phone was "property" under the statute, this Court was guided by a statute defining that term, which defined "property" as "any property * * * includ[ing] * * * telecommunications devices." *Robinson*, 124 Ohio St.3d 76, 2009-Ohio-

5937, ¶ 25. "Telecommunications device" was, in turn, also defined by statute and included telephones and cellular telephones. *Id.* at ¶ 28. Because the statute prohibited conduct that substantially impaired the ability of law enforcement officers to preserve any person or property from harm—and property included phones—the damaging of a single phone was a violation of the statute. *Id.* at ¶ 29. It was the plain language of these defined terms that led the Court to conclude that there was no reason to look beyond the statute. Even then, it reached that conclusion based on the plain language of defined terms, not on any broad-language rule of statutory construction.

Unlike the clear parameters of the term "property" as used in R.C. 2909.04(A)(3), the phrase "makes a report" used in R.C. 3721.24 is neither defined nor plain as to whom the report must be made. Nor is the "makes a report" language otherwise broad or general. Indeed, this language supposes that a report is being made *to* someone. There is nothing "general" or "broad" about R.C. 3721.24's "makes a report" language that would make this phrase unambiguous.

### 3. The statute's "good-faith" requirement has no bearing on who *receives* a report—i.e., it does not set outside parameters as to whom a report must be made.

Hulsmeyer's good-faith argument fares no better. Although she never raised this argument in the courts below, she claims for the first time in this Court that the obligation to make a report in good faith "limits" the statute's "protections to an employee who makes an honest report of suspected abuse or neglect consistent with *** [the] obligation to protect the health and welfare of nursing home residents." Second Br. at 10. She argues that this good-faith requirement limits reports of suspected abuse or neglect to the arbitrary categories of persons or entities she adds to the statute's language—e.g., the nursing

home's director of nursing, a resident's sponsor, and law enforcement—as well as the Director of Health. *Id.* at 10-11.

Hospice and Brookdale do not disagree that the statute imposes a duty of good faith when making a report. Indeed, the statute itself plainly says so. *See* R.C. 3721.24(A). But that duty is imposed on those who *make* a report—it does not set outside parameters of persons or entities who can *receive* the report. On the contrary, the limitation on who *receives* the report is guided by an in pari materia reading of R.C. 3721.24 with the surrounding statutes enacted at the same time—i.e., R.C. 3721.22, 3721.23, 3721.25, and 3721.26. The duty of good faith has nothing to do with limiting the categories of persons and entities to whom a report is to be made. In fact, the way to assure a resident's rights are protected is for the report to be to the Director of Health, who is statutorily empowered to conduct an investigation and protect the resident; not someone without those powers.

At bottom, R.C. 3721.22 through 3721.26 provides a statutory framework for reporting suspected abuse and neglect that empowers the Director of Health, and only the Director of Health, to receive reports of suspected resident abuse or neglect and investigate those reports. It gives the Director of Health, and only the Director of Health, subpoena power to compel the production of documents and the attendance of witnesses at a hearing as to those reports that only the Director of Health can conduct. This framework likewise imposes mandatory obligations on the Director as well. If the report is substantiated, the Director of Health, and only the Director Health, must notify the attorney general, county prosecutor, or other appropriate law enforcement official of the results of the investigation. And if not substantiated, the Director of Health, and only the Director of Health, has the power to expunge all records related to the report and its investigation.

The laundry list of persons and entities that Hulsmeyer seeks to have added to the "makes a report" language of R.C. 3721.24 have none of these powers. And for good reason. The General Assembly enacted these statutes as part of a comprehensive framework for reporting and investigating suspected abuse and neglect; it is entitled to grant protection against retaliation as part of this framework to further the goals the legislative sought to achieve. And that goal here was to empower the Director of Health to fully and completely investigate these reports, and to protect those involved in the process of doing so. Because this reporting and investigatory framework remains intact, as does the protection against retaliation, no "chilling effect" would result. Reports of suspected resident abuse and neglect would continue to received, investigated, and protected. This process best protects the interests of residents.

### B. Hulsmeyer's alternative arguments—i.e., that any ambiguity in R.C. 3721.24 supports her construction—are meritless.

#### 1. No absurdity would result by reading R.C. 3721.24 in pari materia with R.C. 3721.22; they are overlapping statutes with overlapping protections—not distinct statutes with distinct protections.

Hulsmeyer argues that R.C. 3721.24 and 3721.22 are distinct statutes that provide distinct protections, and that construing them together would lead to absurd results. Second Br. at 14-15. In particular, she claims that because R.C. 3721.22 protects "any person" against criminal, civil, or disciplinary liability and R.C. 3721.24(A) protects only "employees" against retaliation, the statutes provide separate and distinct protections that do not compel an in pari materia reading. *Id.*

Hulsmeyer is wrong for two reasons. First, the protections afforded by R.C. 3721.22 and 3721.24 are overlapping, not distinct. Indeed, an employee making a report is

protected against retaliation under R.C. 3721.24(A) as well as protected against criminal, civil, and disciplinary liability under R.C. 3721.22(C). This is so because the "employee" in R.C. 3721.24(A) is also "any person" in R.C. 3721.22(C). "Any person," on the other hand, may include an employee or it may include a nonemployee—either one would receive the benefit of the protection against criminal, civil, or disciplinary liability. *Compare* R.C. 3721.22(C) *with* R.C. 3721.24(A), Appx. 78, 83.

Second, whether distinct or overlapping, R.C. 3721.22(C) and 3721.24(A) are part of a larger statutory framework that grants specific powers to the Director of Health, and the Director of Health alone, as part of the reporting and investigatory process. The statutory protections afforded to those involved in that process are part of this larger framework. That this framework in general, or R.C. 3721.24 and 3721.22 in particular, address specific conduct in specific situations, and provide different but overlapping protections, does not make R.C. 3721.24 a "broad" statute and R.C. 3721.22 a "narrow" statute as OELA argues. They are part of the same framework, enacted together to further the General Assembly's intent to provide a comprehensive scheme for reporting and investigating reports of suspected resident abuse and neglect. The protections they afford may differ to some extent, but their purpose is the same—to protect those involved in the reporting and investigatory process.

Indeed, the broad powers given to the Director of Health underscore the need for these protections. The Director can subpoena witnesses to testify at a R.C. 3721.23 hearing, including the maker of the report. *See* R.C. 3721.23(B)(2), Appx. 80; R.C. 3721.25(D), Appx. 86. Without the protection against retaliation for the reporter, there would be little incentive to report suspected resident abuse or neglect. The General Assembly recognized

this and enacted R.C. 3721.24 along with R.C. 3721.22, 3721.23, 3721.25, and 3721.26 to further its intent to protect nursing home residents from abuse and neglect as well as those involved in the reporting and investigatory process. *See* Am.Sub.H.B. No. 822, Appx. 88, 100-102.

In fact, reading these statutes in pari materia *prevents* the absurd result that Hulsmeyer argues would happen here if the statutes were distinct with distinct protections. Read together, an employee, in particular a licensed healthcare employee, who makes a report of suspected abuse or neglect to the Director Health is afforded *all* the protections of both statutes—i.e., protection against criminal liability, civil liability, professional disciplinary action under R.C. 3721.22(C) *as well as* the protection against retaliation under R.C. 3721.24(A). The absurd result that Hulsmeyer advances—i.e., that an employee making a report to both the Director of Health *and* to a family member would have no protection under R.C. 3721.24(A) (Second Br. at 15)—does not square with an in pari materia reading of the statute. The report made to the Director of Health would qualify regardless if the employee made an additional report to anyone else.

Nothing in an in pari materia reading of these two statutes would result in an employer being free to "terminate with impunity" employees reporting suspected abuse or neglect to anyone other than the Director of Health, nor would it leave nursing home residents without protection, as Hulsmeyer argues. *See* Second Br. at 13. As stated in the Joint First Brief, Hulsmeyer continues to confuse protection of residents with the protection of employee whistleblowers. *See* Joint First Brief at 25. R.C. 3721.17, in particular, provides protection against retaliation for violating any right set forth in R.C.

3721.10 to 3721.17. *See* R.C. 3721.17(G), (I), Appx. 71, 72. An in pari materia reading of R.C. 3721.24 with related statutes would have no effect on those provisions.

### 2. An in pari materia reading of R.C. 3721.24(A) would not lead to an absurd construction of R.C. 3721.24(B).

Hulsmeyer argues that her construction of R.C. 3721.24(A)—i.e., not requiring that the report be made to the Director of Health alone—comports with R.C. 3721.24(B), which she claims similarly does not require a report be made to the Director of Health. Second Br. at 16. Again, Hulsmeyer is mistaken.

Even though not at issue here, R.C. 3721.24(B) protects a *resident* from retaliatory conduct after making a report of suspected abuse or neglect. *See* R.C. 3721.24(B), Appx. 83. But that statutory provision, like R.C. 3721.24(A), similarly must be read in pari materia with R.C. 3721.22. And, when read together, requires the resident, like the employee in subsection (A), to make a report to the Director of Health.

No absurdity would result from such a construction. Although Hulsmeyer argues that a nursing home resident would not be protected against retaliation if the resident reported suspected abuse or neglect to a family member, Hulsmeyer is again wrong. R.C. 3721.24(B) may not provide the protection against retaliation if the report was made to anyone other than the Director of Health, but R.C. 3721.17 provides an additional layer of protection—not only retaliatory conduct but for any violation of R.C. 3721.10 to 3721.17, which includes protections for abuse and neglect. *See* R.C. 3721.17(G), (I); *see also* R.C. 3721.13(A)(1), (2). There is nothing absurd about giving a nursing resident more than one avenue of statutory protection against retaliation.

Hulsmeyer recognizes the additional protections afforded by R.C. Chapter 3721 when she argues that R.C. 3721.24(A) should be read in pari materia with the entire Chapter and with related provisions of the Ohio Administrative Code. *See* Second Br. at 17-18. Indeed, she points to R.C. 3721.13(A)(32) regarding the resident's right to be informed of significant health changes as if this statute supports her argument. *Id.* at 17. It does not. To reiterate, R.C. 3721.17(G) prohibits retaliation for exercising any right under R.C. 3721.10 to 3721.17, which includes, among others, prohibiting retaliation when a county prosecutor or the attorney general is notified of possible violations. *See* R.C. 3721.17(G)(3), Appx. 71. It is of no consequence than that other sections of R.C. Chapter 3721 may provide different or additional protections for a variety of other actions, activities, and conduct. That the General Assembly enacted R.C. 3721.22 to 3721.26 to provide another framework within that Chapter to protect additional or overlapping interests does not render the construction Hospice and Brookdale urge here absurd.

### 3. An in pari materia reading of R.C. 3721.24 does not render the confidentiality afforded by R.C. 3721.25 meaningless.

Hulsmeyer argues circuitously that an in pari materia reading of R.C. 3721.24 renders R.C. 3721.25 meaningless because "it is unlikely that an employer would ever learn of the identity of an employee who made a report of abuse or neglect to the director or health." Second Br. 18-19.

This argument fails for two reasons. First, the prohibition against disclosure is not absolute; there are exceptions, including when disclosure is required by court order or is otherwise necessary to enforce a statute or rule, or if the reporting person consents, among others. R.C. 3721.25 provides:

> *Except as required by court order, as necessary for the administration or enforcement of any statute or rule relating to long-term care facilities or residential care facilities, or as provided in division (D) of this section,* the director of health shall not disclose any of the following *without the consent* of the individual or the individual's legal representative:
>
> (a) The name of an individual who reports suspected abuse or neglect of a resident or misappropriation of a resident's property to the director * * *. (Emphasis added.)

R.C. 3721.25(A)(1), Appx. 85. Subsection (D) thereafter exempts from the confidentiality afforded by this section "the individual [who] is to testify" in any R.C. 3721.23 proceedings. *See* R.C. 3721.25(D), Appx. 86.

Second, the General Assembly recognized that protection against retaliation would be necessary because the confidentiality under R.C. 3721.25 is *not* absolute. Indeed, because the person making the report may consent to disclosure (or even advise the employer herself) or the disclosure of the reporting person's identity may be compelled in certain situations—e.g., by court order or by testifying—there would be a precise need to protect the reporting person from any retaliation. The plain wording of R.C. 3721.25 makes this clear because it prohibits disclosure of the "name of an individual who reports suspected abuse or neglect of a resident * * * *to the director.*" (Emphasis added.) R.C. 3721.25(A)(1)(a), Appx. 85.

Consequently, reading R.C. 3721.24(A) in pari materia with related statutes R.C. 3721.22, 3721.23, 3721.25, and 3721.26 does not render R.C. 3721.25 meaningless. On the contrary, it furthers the objectives of the General Assembly in providing a statutory framework for reporting and investigating reports of suspected abuse and neglect by protecting from retaliation those involved in this reporting and investigatory process.

The parade of horribles that Hulsmeyer and her amici present here rests on conjecture, an illogical construction of these related statutes, and a misunderstanding of R.C. Chapter 3721. At bottom, no logical legal analysis supports that any of the Hulsmeyer-added persons or entities—a resident's sponsor, a superior in management, law enforcement, a facility's director of nursing, any appropriate entity, or someone in the vicinity—are those to whom a report of suspected resident abuse or neglect must be made to come within the protection against retaliation afforded by R.C. 3721.24.

On the contrary, applying well-established principles of statutory construction, the "makes a report" language of R.C. 3721.24(A)—even though it is silent as to whom a report must be made—can only mean a report made to the Director of Health. The statutory framework for reporting and investigating reports of suspected resident abuse and neglect—all enacted together as a result of Am.Sub.H.B. No. 822—supports this construction. *See* Am.Sub.H.B. No. 822, Appx. 88, 100-102. For only by making a report to the Director of Health is the public assured a resident's rights will be protected.

### C. The policy arguments advanced by amici curiae cannot alter the policy decisions made by the General Assembly in enacting R.C. 3721.22 through 3721.26.

Most of brief filed by amicus parties Disability Rights Ohio, AARP, and others is devoted to educating the Court about elder abuse and how to protect against it. *See* Amici Curiae Merit Br. 3-10.

Hospice and Brookdale acknowledge that the protection of the elderly is an important and laudable goal. Indeed, they would not be providing services to this population if they did not aspire to that same goal. But as important as this goal is, it does

not trump the policy decisions made by the Ohio General Assembly in enacting legislation intended to govern the reporting and investigation of reports of suspected resident abuse.

Here, the General Assembly enacted entirely new sections R.C. 3721.22 through 3721.26 as part of a comprehensive statutory framework intended to govern the reporting of suspected abuse, investigating suspected abuse, and protecting those who make reports of abuse. *See* Am.Sub.H.B. No. 822, Appx. 88, 100-102. That legislative body determined which policy interests to advance and protect, and it did so here by enacting related statutes protecting employees from a retaliatory employment action when the employee makes a report of suspected abuse to the Director of Health. *See Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, ¶ 16-17 (construing R.C. 3721.22 and 3721.24 together and finding the "public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who would report violations of those rights would not be jeopardized in the absence of a common-law wrongful-discharge tort.")

The General Assembly's policy decision to enact this framework protects both the interests of the resident and the reporting individual by imposing obligations on the Director of Health and protections for the reporting individual. That the General Assembly chose this statutory framework for the protection of nursing home residents and those reporting suspected abuse is not subject to judicial modification no matter how just and noble the cause of amici curiae. *See Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, ¶ 24 ("[I]t would be inappropriate for the judiciary to * * * supplant the policy choice of the legislature."). Instead, the role of the judiciary is "to interpret existing statutes, not rewrite them." *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶ 44.

This deliberate statutory framework provides a mechanism where reports of suspected abuse are made to a person of authority—the Director of Health—who has broad investigatory powers, issues findings as a result of that investigation, and makes referrals to the attorney general, county prosecutor, or other appropriate law enforcement official if abuse is substantiated and can expunge all records if unsubstantiated. R.C. 3721.23(C), Appx. 81-82. This framework protects both the interests of the resident and the reporting individual. The General Assembly determined that it wanted reports made to the Director of Health to best protect residents. That Hulsmeyer and her amici believe this statutory framework should be different is an issue for the General Assembly to resolve, not the courts. *See Kaminski v. Metal & Wire Prod. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 59 (noting "the legislative branch of government is 'the ultimate arbiter of public policy'" and has "the power to continually refine Ohio's laws" to meet the needs of its citizenry).

At bottom, Hulsmeyer's arguments and that of amici curiae are unavailing. R.C. 3721.22 through 3721.26 are related statutes that must be read together. When read together, the report referenced in R.C. 3721.24 means a report made to the Director of Health. Because Hulsmeyer did not allege in her complaint that she made any such report, her complaint fails to state a claim upon which relief can be granted and the trial court properly dismissed her retaliatory-discharge claims.

## III. Argument in response to cross-appeal

**Cross-Appellee's Counterproposition of Law**

> Hulsmeyer cannot recover in a wrongful-discharge tort when the public policy is based on reporting abuse because R.C. 3721.24 provides an adequate remedy and the public policy is not jeopardized in the absence of a separate common law claim.

The law in Ohio has established that there cannot be a separate wrongful-discharge claim because the public policy of protecting resident abuse and reporting violations of resident abuse is embodied and adequately protected in R.C. 3721.24 and the public policy would therefore not be jeopardized without the separate wrongful-discharge tort. To establish a public policy wrongful-discharge claim, Hulsmeyer must prove that (1) a clear public policy exists; (2) dismissing employees under circumstances like hers would jeopardize the public policy; (3) causation; and (4) Hospice lacked an overriding legitimate business justification for the dismissal. *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70 (1995).

### A. The public policy based on reporting abuse is not jeopardized in the absence of a separate common law claim.

In analyzing the jeopardy element, this Court has previously held that "[a]n analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim." *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, ¶ 13. Hulsmeyer cannot establish that public policy would be jeopardized because R.C. 3721.24 provides as sufficient and appropriate remedy; thus, a common-law tort is unnecessary as a matter of law.

On appeal, the First District Court of Appeals properly upheld the trial court's decision to dismiss Hulsmeyer's wrongful-discharge claim against Hospice. The First

District correctly followed its decision in *Dolan v. St. Mary's Mem. Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, ¶ 16 (1st Dist.) and this Court's decision in *Wiles*, 96 Ohio St.3d 240, 2002-Ohio-3994, and found that "because the remedies provided by R.C. 3721.24 were sufficient to vindicate the 'public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who would report violations of those rights,' the public policy expressed in R.C. Chapter 3721 would not be jeopardized by the lack of a common-law public policy claim." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2013-Ohio-4147, 998 N.E.2d 517, ¶ 31 (1st Dist.), quoting *Dolan*, 153 Ohio App.3d 441, 2003-Ohio-3383, ¶ 17.

Hulsmeyer's merit brief cites to *Dolan*, yet, the decision in *Dolan* directly supports Hospice's position. *See* Second Br. at 24. In *Dolan*, plaintiff/appellant Nancy Dolan, former director of nursing of defendant, filed a complaint against her former employer and her former supervisor, alleging that she was wrongfully discharged from employment. *Dolan*, 153 Ohio App.3d 441, 2003-Ohio-3383, ¶ 1. While employed, plaintiff Dolan allegedly contacted the family of a resident without first informing her employer, in violation of company policy. *Id.* at ¶ 3. Much like Hulsmeyer in the present case, in *Dolan* the plaintiff argued that her termination jeopardized the public policy set forth in R.C. 3721.10 through R.C. 3721.17 and 3721.24. *Id.* at ¶ 11.

The First District ruled that there is no public policy claim outside of R.C. 3721.24 and held, "[t]he public policy embodied in R.C. Chapter 3721 of protecting the rights of nursing-home residents and of others who report violations of those rights would not be jeopardized in the absence of a common-law wrongful discharge tort." *Id.* at ¶ 10–17. Accordingly, Hulsmeyer cannot assert a separate wrongful-discharge claim because the

public policy of protecting resident abuse and reporting violations of resident abuse is embodied in R.C. 3721.24. The rights of the residents and those who report suspected abuse would not be jeopardized in the absence of a separate wrongful-discharge tort. Even if this matter is examined under the "multiple sources" theory as suggested by Hulsmeyer, R.C. 3721.24 provides an adequate remedy which precludes the recognition of a common-law action for wrongful discharge. *See* Second Br. at 24.

Similar to the holding reached by the First District, this Court in *Wiles v. Medina Auto Parts* held that despite the existence of a clear public policy in favor of allowing an employee to take medical leave pursuant to the Family Medical Leave Act (FMLA), the jeopardy element was not satisfied because the FMLA "contained a comprehensive remedial scheme," and as a result, this Court refused to recognize a cause of action for wrongful discharge in violation of public policy." 96 Ohio St.3d 240, 2002-Ohio-3994, ¶ 17. According to this Court, "there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interest." *Id.* at ¶ 13. Here, an adequate statutory remedy exists pursuant to R.C. 3721.10 through 3721.17. Thus, this Court need not recognize an action for wrongful discharge in violation of public policy.

Much like Hulsmeyer's reliance on *Dolan*, Plaintiff also relies on *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921 (*see* Second Br. 24), yet, it too directly supports Hospice's position. In *Leininger*, this Court recognized the futility of a public policy claim "when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct." *Leininger* at ¶ 27. This Court made clear

that "when a statutory scheme contains a full array of remedies, the underlying public policy claim for wrongful discharge is not recognized based on that policy" regardless of whether multiple sources are involved. *Id.* Accordingly, Hulsmeyer cannot recover in a wrongful-discharge tort when the public policy is based on reporting suspected abuse because R.C. 3721.24 provides an adequate remedy and the public policy is not jeopardized in the absence of a separate common law claim.

### B. Even though Hulsmeyer does not have a retaliation claim under R.C. 3721.24, Hulsmeyer still cannot successfully assert a wrongful-discharge claim.

The issue pending before this Court regarding Hulsmeyer's retaliation claim under R.C. 3721.24 does not impact the outcome of Hulsmeyer's wrongful-discharge claim. Contrary to Hulsmeyer's assertions, even assuming that this Court holds that Hulsmeyer does not have a retaliation claim under R.C. 3721.24, Hulsmeyer's wrongful-discharge claim still fails because there cannot be a separate public policy claim as society's interests are adequately protected under R.C. 3721.24.

Contrary to Hulsmeyer's position, a decision rendered in Hospice's favor would not leave "a gaping hole in the antiretaliatory provision's protection of persons who report suspected abuse or neglect of nursing home patients." *See* Second Br. at 22. Hulsmeyer's reliance on *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, is misplaced. In *Sutton*, an employee was injured while on the job, and after informing the company president that he was injured, the president fired the employee within an hour. *Id.* at ¶ 2. The employee later filed suit alleging that his employer terminated him to avoid a workers' compensation claim. *Id.* at ¶ 3. The employee asserted two claims for relief—a statutory claim for unlawful retaliation under R.C. 4123.90 and a tort claim for wrongful

discharge. *Id.* This Court held that a gap existed where an employee was terminated in relation to his or her workplace injury where the employee was retaliated against prior to initiating a worker's compensation claim. *Id.* at ¶ 8. According to this Court, the General Assembly did not intend to leave such a gap in protection; thus, although the employee's statutory claim failed, the employee was permitted to bring a common-law tort claim for wrongful discharge in violation of public policy. *Id.* These facts are unlike the facts presently before the Court in the instant appeal.

Unlike the facts in *Sutton*, Hulsmeyer had an adequate remedy available to her by complying with R.C. 3721.24. Additionally, where the employee in *Sutton* was allegedly without relief, Hulsmeyer could have complied with, and asserted a claim, pursuant to R.C. 4113.52. R.C. 4113.52, Ohio's Whistleblower Statute, provides adequate protection and remedies for protected whistleblowers.[2] Assuming Hulsmeyer reasonably suspected abuse of a resident; Hulsmeyer could have reported that conduct to her employer pursuant to the Ohio Whistleblower Statute. Accordingly, no such gap as alleged by Hulsmeyer exists in this case.

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[2] Pursuant to R.C. 4113.52(A)(1)(a), where an employee in the course of his or her employment becomes aware of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employer has the authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm or hazard to public health or safety or is a felony, the employee must follow the provision outlined in the statute to be afforded protection. Under such circumstances, R.C. 4113.52(A)(1)(a) requires that the employee orally notify his or her supervisor or other responsible officer of the employer of the violation and subsequently file with that person a written report that provides sufficient detail to identify and describe the violation.

Whistleblower protection is limited under Ohio law, which does not equate to a "gap" in the law. Ohio Courts, including this Court, have consistently ruled that an individual must strictly comply with the statutory requirements to be protected as a whistleblower. *See Contreras v. Ferro Corp.*, 73 Ohio St.3d 244, 246-48 (1995); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 152-53 (1997); *Abrams v. Am. Computer Tech.*, 168 Ohio App.3d 362, 2006-Ohio-4032, ¶ 40 (1st Dist.); *Grove v. Fresh Mark, Inc.*, 156 Ohio App.3d 620, 2004-Ohio-1728, ¶ 30 (7th Dist.). Simply because Plaintiff failed to take advantage of an alternative statutory scheme, and that scheme also has specific requirements to gain protection, does not create a "gap" in the law. Plaintiff's failure to comply with an alternative statutory scheme, otherwise made available to her, does not create a gap as established in the *Sutton* case.

Furthermore, if this Court finds that Hulsmeyer, a licensed health professional, was required to report suspected abuse to the Director of Health to gain protection under R.C. 3721.24, her wrongful-discharge claim fails for the additional reason that she did not comply with the requirements of R.C. 3721. Ohio law is clear that when an employee's discharge is not actionable under the law that establishes the "clear public policy," the related common-law claim for relief likewise fails as a matter of law. *Arsham-Brenner v. Grande Point Health Care Community*, 8th Dist No. 74835, 2000 WL 968790 (July 13, 2000), citing *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134 (1997).

In *Kulch v. Structural Fibers, Inc.*, this Court held, "[a]n at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer * * * so long as that employee had fully complied with the statute and was subsequently discharged or disciplined." *Id.* at

paragraph three of the syllabus. Likewise, and directly relevant to Hulsmeyer, in *Arsham-Brenner*, the Eighth District Court of Appeals determined that because the plaintiff had not established grounds for relief under R.C. 3721.24, she could not *also* sustain her wrongful-discharge claim. *Arsham-Brenner*, 8th Dist. No. 74835, 2000 WL 968790, at *7-8 (July 13, 2000). Hulsmeyer does not have a common law wrongful-discharge claim because her remedy lies in R.C. 3721.24 and because she failed to comply with the requirements of the statute.

Accordingly, the law in Ohio has established that there cannot be a separate wrongful-discharge claim because the public policy of protecting resident abuse and reporting violations of resident abuse is embodied and adequately protected in R.C. 3721.24 and the public policy would therefore not be jeopardized without the separate wrongful-discharge tort. There is no "gap" in Ohio law. Hulsmeyer simply failed to avail herself of the adequate remedies under the law by following the requirements.

## IV. Conclusion

Hulsmeyer's arguments that R.C. 3721.24 should not be read in pari materia with related statutes R.C. 3721.22 through 3721.26 fail. She only reaches her construction of the statute by adding words to the statute that are not there, or anywhere in R.C. 3721.22 through 3721.26. At bottom, R.C. 3721.24 must be read in pari materia with these related statutes and, when read together, means that a report of suspected resident abuse and neglect must be made to the Director of Health. The decision of the First District should be reversed.

Hulsmeyer's alternative argument on cross-appeal should also fail, if reached. She has no claim for wrongful discharge in violation of public policy. This part of the First District's decision should be upheld.

Respectfully submitted,

(per consent)
Michael W. Hawkins (0012707)
(Counsel of Record)
Faith C. Whittaker (0082486)
DINSMORE & SHOHL LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202
Tel: (513) 977-8200
Fax: (513) 977-8141
michael.hawkins@dinsmore.com
faith.whittaker@dinsmore.com

*Attorneys for Defendants-Appellants Hospice of Southwest Ohio, Inc. and Joseph Killian*

Susan M. Audey (0062818)
(Counsel of Record)
Victoria L. Vance (0013105)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
susan.audey@tuckerellis.com
victoria.vance@tuckerellis.com

*Attorneys for Defendant-Appellant Brookdale Senior Living, Inc.*

**PROOF OF SERVICE**

A copy of the foregoing was served on July 29, 2014 per S.Ct.Prac.R. 3.11(B) by mailing it by United States mail and electronically by e-mail to:

Robert A. Klingler
Brian J. Butler
ROBERT A. KLINGLER Co., L.P.A.
525 Vine Street, Suite 2320
Cincinnati, OH 45202-3133
rak@klinglerlaw.com
bjb@klinglerlaw.com

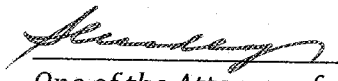
*Attorneys for Appellee/Cross-Appellant Patricia Hulsmeyer*

Frederick M. Gittes
Jeffrey P. Vardaro
The Gittes Law Group
723 Oak Street
Columbus, OH 43205
fgittes@gitteslaw.com
jvardaro@gitteslaw.com

*Attorneys for Amicus Curiae Ohio Employment Lawyers Association*

Andrew Brennan
Kristen Henry
Michael Kirkman
Ohio Disability Rights Law & Policy Center, Inc.
Disability Rights Ohio
50 West Broad Street, Suite 1400
Columbus, OH 43215-5923

*Attorneys for Amici Curiae Disability Rights Ohio, AARP, National Senior Citizens Law Center, National Health Law Program, and National Disability Rights Network*



*One of the Attorneys for Appellants/Cross- Appellees*